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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

STEPHEN FRIDAY,

Defendant and Appellant.

H032863

(Monterey County  
Super. Ct. No. SS041854A)

Defendant Stephen Friday appeals from a judgment entered upon his plea of no contest to battery by a prisoner upon a prison officer (Pen. Code, § 4501.5) and his admission of a prior conviction within the meaning of the Three Strikes Law (Pen. Code, § 1170.12, subd. (c)(1)).<sup>1</sup> He contends that the court abused its discretion by (1) refusing to allow him to withdraw his plea and (2) declining his request to dismiss the allegation of the prior "strike" conviction. We find no error and therefore will affirm the judgment.

*Background*

On June 23, 2004, defendant was charged by complaint with one count of battery by a prisoner, in violation of section 4501.5, with a prior conviction of robbery with use of a firearm (§§ 211; 12022.5, subd. (a)(1)), a violent felony under section 1170.12, subdivision (c)(1). The charges arose from an altercation four months earlier between

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<sup>1</sup> All further statutory references are to the Penal Code except as otherwise stated.

defendant and a prison officer that developed when defendant refused to perform his work duties or return to his cell. According to an investigator's testimony at the preliminary hearing, the officer was trying to gain physical control of defendant, but during the struggle defendant jumped on top of the officer and struck him repeatedly with his fist.

On January 16, 2008, defendant pleaded no contest to the battery and admitted the "strike" allegation. At the change-of-plea hearing the court recited its understanding that defendant was pleading no contest with the understanding that if the court dismissed the strike allegation, he would receive no more than two years in prison; and if the court did not dismiss the allegation, he would receive no more than four years. "Plus," the court added, "you're entitled to any credits." Defendant sought clarification of the extent of his credits. Defense counsel told the court that she had advised defendant that his credits "would include from the time he was released on parole, which was December 2005." The court explained, "You're entitled to start earning credits from the day you begin your parole. Whatever day it was in December of '05, that's when we start calculating the credits from that day forward." After taking the plea, the court asked counsel to "both put your heads together, verify the actual and then the custody credits, and then just present that to me at the time of judg[ment] and sentencing." The prosecutor agreed to "verify" defendant's parole date and calculate the credits accordingly.

Later that day, the prosecutor informed defense counsel that according to prison records, defendant had been released on parole on September 27, 2005, giving him credit of 854 actual days as of January 30, 2008. "Calculation as to good time/work time will depend on the outcome of the *Romero* motion as to whether it will be 4 days for 10 . . . or 80%."<sup>2</sup> In anticipation of the January 30 sentencing hearing, defense counsel calculated defendant's credits to be 854 days plus either 170 days or 427 days, depending on which

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<sup>2</sup> *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

of the prosecutor's two alternative measures of conduct credits were used. Thus, she suggested, defendant was entitled to a total credit of 1,024 or 1,281 days.

On January 30, 2008, however, the district attorney filed a brief entitled "Calculation of Credits," which stated that defendant's credits did not begin accumulating until February 22, 2007. According to a memorandum from the sheriff of Monterey County, defendant had failed to appear in court for this case on March 8, 2006, leading to issuance of an arrest warrant on March 14, 2006. He was taken into custody in Los Angeles County on February 22, 2007 and released to Monterey County shortly thereafter.<sup>3</sup> Consequently, the district attorney stated, defendant "should receive credit from February 22, 2007, when he was in custody in Los Angeles and the Monterey County warrant was requested." Defendant's actual credits thus amounted to 313 days in 2007 and 107 days in 2008 (as of April 16), for a total of 420 days, not the 854 days represented to defendant earlier. Adding in 210 good-time/work-time credits, the district attorney calculated a total credit of 630 days, not the 1,024 or 1,281 days calculated by defense counsel.

On March 3, 2008, defendant moved to withdraw his plea on the ground that the court and prosecutor had led him to believe that he would receive presentence credit from the day he began his parole on the prior offense to the time of sentencing in this case. In

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<sup>3</sup> The prosecutor and the trial court more precisely identified the dates of defendant's absences in connection with his motion to dismiss for lack of a speedy trial. According to these findings, defendant was ordered to appear on November 9, 2005 (after being released on parole) and on November 14, 2005 for trial. He failed to appear on those dates but appeared on November 16, 2005. The case was re-set for trial on March 20, 2006, but by this time defendant was in Los Angeles County. After defendant failed to appear on March 8, 2006, a bench warrant issued. Defendant's first subsequent appearance in Monterey County Superior Court was March 1, 2007, after his arrest in and transfer from Los Angeles County. Defendant had a different account of the underlying events. According to his declaration, he was in custody in Los Angeles County between December 2005 and December 2006. His whereabouts, he insisted, were always known to the authorities.

opposition, the prosecutor maintained that the court had not misrepresented anything and that defendant's plea had been voluntary. The trial court found that there was no "involuntary entry of the plea [or] any misrepresentation." Referring back to the advisements given to defendant at the plea hearing, the court stated, "I think the information [given to] the Defendant is accurate, that credits will start from the time that he's paroled, that's when they start being calculated from. But, the Court never indicated that it was particular in this case." The court rejected a motion to dismiss a prior conviction allegation and proceeded to sentence defendant to the lower term of two years, doubled under the Three Strikes law, with credit of 630 days.

### *Discussion*

#### *1. Motion to Withdraw Plea*

Penal Code section 1018 allows a trial court to grant a defendant's application to withdraw his or her guilty plea "before judgment . . . for a good cause shown . . . ." As the court explained in *People v. Cruz* (1974) 12 Cal.3d 562, 566, "Mistake, ignorance or any other factor overcoming the exercise of free judgment is good cause for withdrawal of a guilty plea." "Other factors overcoming defendant's free judgment include inadvertence, fraud or duress." (*People v. Huricks* (1995) 32 Cal.App.4th 1201, 1208.) The requisite "good cause," however, must amount to more than post-plea remorse; "[a] plea may not be withdrawn simply because the defendant has changed his mind." (*Ibid.*) The defendant must demonstrate good cause by clear and convincing evidence. (*People v. Cruz, supra*, 12 Cal.3d at p. 566.) Furthermore, "[g]uilty pleas resulting from a bargain should not be set aside lightly and finality of proceedings should be encouraged. [Citations.]" (*People v. Hunt* (1985) 174 Cal.App.3d 95, 103; accord, *People v. Weaver* (2004) 118 Cal.App.4th 131, 146.) In determining facts, "the trial court is not bound by uncontradicted statements of the defendant." (*People v. Hunt, supra*, 174 Cal.App.3d 95, 103.)

The trial court's denial of a motion to withdraw a plea is reviewed for abuse of discretion, and its decision will not be reversed on appeal unless a clear abuse of discretion is demonstrated. (*People v. Wharton* (1991) 53 Cal.3d 522, 585; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1254.) In making our determination, we must adopt the trial court's factual findings if substantial evidence supports them. (*People v. Fairbank, supra*, 16 Cal.4th at p. 1254.)

A trial court must advise a defendant of the direct consequences of a plea of guilty or no contest to a felony or misdemeanor before it accepts the plea. (*In re Moser* (1993) 6 Cal.4th 342, 352; *Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 605.) Failure to give a necessary advisement is a ground for withdrawal of the plea if the defendant establishes that he was prejudiced by the misadvisement -- that is, he would not have entered the challenged plea had the trial court given a proper advisement. (*In re Moser, supra*, 6 Cal.4th at p. 352.) Direct legal consequences include ineligibility for probation (*People v. Caban* (1983) 148 Cal.App.3d 706, 711), mandatory parole consequences (*In re Moser, supra*, 6 Cal.4th at p. 352), and a mandatory minimum sentence. (Cf. *People v. Dakin* (1988) 200 Cal.App.3d 1026, 1033-1034 [failure to advise of mandatory one-year jail term before slow plea].) " 'Guilty pleas resulting from a bargain should not be set aside lightly and finality of proceedings should be encouraged.' [Citation.]" (*People v. Weaver, supra*, 118 Cal.App.4th at p. 146.)

In this case, it initially appears that defendant was misadvised about the number of credits to which he was entitled. However, at the conclusion of the plea hearing the court instructed counsel to verify the estimates they had made for the credit calculation. Thus, it was apparent to all present that further research was necessary before they could ascertain the correct number of credits to which defendant was entitled. Moreover, the discussion of credits at the hearing was based on the erroneous assumption that defendant had been in custody for this offense from the end of his prison term to the date of the change-of-plea hearing. It only later came to light that after his September 27, 2005

release from prison, defendant was out of custody for the remainder of 2005 and in Los Angeles County in 2006. At the time of the hearing defendant was fully aware, even if the court and both counsel were not, that he was not in custody during the entire period they had used to estimate his custody credits. Thus, defendant could not have been misled by their factual error. He should not be permitted to take advantage of a misunderstanding promoted by his own silence. Because substantial evidence supports the court's implicit finding that defendant was in fact aware that he was not entitled to custody credits for the time he was out of custody, we must uphold the denial of defendant's motion to withdraw his plea. This case offers no rational ground for subverting the finality of proceedings by setting aside the parties' bargain.

## *2. Romero Motion*

In anticipation of sentencing, defendant asked the court to strike a prior conviction of robbery committed when he was 17 years old, pursuant to section 1385 and *People v. Superior Court (Romero)*, *supra*, 13 Cal.4th 497. The court denied the request, explaining that the prior and the current offense were of similar nature and severity; it further noted that defendant had exhibited violence in both, and that he had used a gun on the prior occasion.<sup>4</sup>

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<sup>4</sup> In denying the request the court cited the following circumstances: "The nature of the prior strikes; the prior involved use of weapon or act of violence; and as to the Defendant's prior record, that the original [section] 211 . . . was with a gun, and that here the battery is on an officer in CDC, indicating that as far as the Court's concerned, as far as severity goes . . . the Court feels they're similar types of events, that the record reflects the history of violence and that the crime involved did involve violence under nature of current offense, finds that it is serious relative to other acts of a similar nature, reviewing similar types of charges filed, that in comparison, this was a serious incident with other events of the same or similar nature, and that this event involved violence, as did his prior record, and that the Defendant was the main participant in this event." The court also received a record of rule violations defendant had committed while in custody; most involved physical fighting with other inmates and resisting staff orders.

Defendant protests that his four-year sentence is unjust. He believes the prior "strike" allegation should have been dismissed in the interests of justice, thereby reducing his sentence to two years. Defendant concedes that his conduct in assaulting the correctional officer was "reprehensible," and he acknowledges that his prior conviction was for armed robbery. However, in his view, his current offense was "not such serious conduct as to suggest that appellant is the kind of person for whom the Legislature and voters devised the Three Strikes Law. As he does not fall within the spirit of that law, the trial court abused its discretion in sentencing him to the doubled term."

In *People v. Carmony* (2004) 33 Cal.4th 367, our Supreme Court summarized the principles applicable to a trial court's ruling on a request to strike one or more prior "strike" allegations under section 1385. " 'In *Romero*, we held that a trial court may strike or vacate an allegation or finding under the Three Strikes law that a defendant has previously been convicted of a serious and/or violent felony, on its own motion, "in furtherance of justice" pursuant to . . . section 1385(a).' (*People v. Williams* (1998) 17 Cal.4th 148, 158 . . . (*Williams*).) We further held that '[a] court's discretionary decision to dismiss or strike a sentencing allegation under section 1385 is' reviewable for abuse of discretion. (*Romero, supra*, 13 Cal.4th at p. 531.)" (*Carmony, supra*, 33 Cal.4th at p. 373.)

" '[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, "in furtherance of justice" pursuant to Penal Code section 1385(a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent

felonies.' (*Williams, supra*, 17 Cal.4th at p. 161.)" (*Carmony, supra*, 33 Cal.4th at p. 377.)

"In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, ' "[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve the legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review." ' [Citations.] Second, a ' "decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.' " ' [Citations.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Carmony, supra*, 33 Cal.4th at pp. 376-377.)

In light of these principles, we find no abuse of discretion. Defendant's challenge is based on his own view that he does not fall within the spirit of the Three Strikes Law, but he offers no basis for concluding that the court acted irrationally or arbitrarily in deciding otherwise. " [T]he Three Strikes law does not offer a discretionary sentencing choice, as do other sentencing laws, but establishes a sentencing *requirement* to be applied in every case where the defendant has at least one qualifying strike, unless the sentencing court "conclud[es] than an exception to the scheme should be made because, for articulable reasons which can withstand scrutiny for abuse, this defendant should be treated as though he actually fell outside the Three Strikes scheme." ' [Citation.]" (*Carmony, supra*, 33 Cal.4th at p. 377, *italics added*.) Defendant received the lower term on the current offense, thus reflecting the court's determination that the battery on the officer did not merit harsher punishment. The court then followed the law as explained in *Carmony* and properly exercised its discretion by doubling the two-year term.



*Disposition*

The judgment is affirmed.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.